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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-206123

DATE: November 30, 1982

MATTER OF: Emerson-Sack-Warner Corporation

DIGEST:

1. When doubt exists as to when a protester knew or should have known the basis for its protest, GAO will resolve that doubt in favor of the protester and consider the protest on the merits.
2. GAO will not question the contracting agency's decision to use a fixed-price type contract so that travel costs to and from the place of performance are treated as an indirect cost under a time and materials contract since it is well established that it is the agency's responsibility to determine its needs and the best methods of accommodating those needs.
3. Although it would have been better for the contracting agency to have canceled the solicitation, the agency did not act unreasonably when it made an award to the protester's competitor since the protester had indicated that it would not participate in a rebidding under either the original solicitation or an amended one because the protester did not agree with the agency's revised travel cost provisions.

Emerson-Sack-Warner Corporation (ESW) protests the award of a contract to Newport Ship Yard, Inc. (NSY), under invitation for bids (IFB) No. N0014-R1-B-ZJ56, issued by the Department of the Navy, Naval Regional Contracting Office Detachment (Navy), Newport, Rhode Island.

The IFB solicited bids for an Indefinite Delivery/Indefinite Quantity type contract with time and material provisions which would require the successful bidder to furnish "equipment, labor, and material to perform services

in the repair, fabrication and installation of sheet metal components on board surface ships." The services are to be performed on board vessels at the Naval Education and Training Center, Newport, Rhode Island. The Navy amended the IFB after bid opening; and when ESW refused to acknowledge the amendment, the ESW bid was rejected as nonresponsive and the award made to NSY. ESW argues that the amendment was improper and that, as the low bidder, it was entitled to the award.

We deny the protest.

The IFB was issued on June 5, 1982, and bids were received from ESW, NSY, and Carlson Metalcraft Co., Inc. After evaluating the bids, the Navy found ESW to be low and NSY to be second low and by letter of July 8, 1981, notified all bidders of the anticipated award to ESW. However, shortly after making this announcement, the Navy decided that the IFB clauses dealing with reimbursement for travel costs were ambiguous and did not reflect what the agency actually intended. As a result, the Navy issued a letter on August 31, 1982, notifying ESW that, due to "vague and inadequate specifications" regarding reimbursement for travel expenses, the IFB was canceled and that the requirement would be resolicited. Upon receipt of this letter, ESW wrote the contracting officer questioning the fairness of canceling the solicitation since bid prices had been exposed and suggesting that ESW and the Navy simply agree to delete or correct whatever IFB provision the Navy found objectionable.

The IFB provisions in question are paragraphs C30 and C32. The pertinent part of paragraph C30 is subsection 1d which provides:

"Travel time: Hours spent in local travel status shall not be considered as time of performance under the contract if they are incurred reporting to or returning from the place of performance specified in the order. Personnel in travel status outside of the normal work area shall be considered as time of performance under the contract and shall be reimbursed at the straight (regular) time rate in section E, above, however, such reimbursement shall not exceed eight (8) manhours per man for any one (1) calendar days."

Paragraph C32, entitled "Travel and Per Diem," supplements C30 and provides:

"In accordance with Subsection C30, the Contractor shall be reimbursed for actual costs incurred to the extent they do not exceed the prevailing rates authorized for Navy Civilian employees in official travel status under similar circumstances. The ordering officer must authorize the incurrence of such costs in the order. Local travel, within the normal work area (50 miles), is not reimbursable nor is local travel within the normal work area to and from a Government installation reimbursable unless said travel is necessary and specifically authorized by the ordering officer in the order."

According to the Navy, it intended the IFB's provisions to provide that the contractor would not be reimbursed for travel costs between its plant and the place of performance specified in the solicitation (the Naval Education and Training Center); travel costs would only be reimbursed if the contractor was ordered to perform services at some other site outside of the "normal work area" (that is, outside of a 50-mile radius around Newport). When the Navy received EBW's suggestion that the "vague and inadequate specifications" be corrected or deleted by mutual agreement, it rescinded its August 31 letter canceling the IFB and on October 6, 1981, issued an amendment aimed at clarifying the solicitation's travel cost provisions along the lines mentioned above. This amendment provides in pertinent part:

"1) Clause C30 and C32 of the basic Solicitation are hereby deleted and the following inserted in lieu thereof:

"C30 REIMBURSEMENT

TIME/MATERIAL AND
LABOR HOUR CONTRACTS

* * * * *

"c. Travel Time: Hours spent in travel status shall not be considered as time of performance under the contract if they are incurred reporting to or returning from the place of performance specified herein. No

costs related to travel to, from or within the sites of performance specified herein will be reimbursed.

* * * * *

"C32 OTHER SITES OF PERFORMANCE

"In the event that situations require performance at a site other than those specified herein, the contractor may be reimbursed for costs associated with travel to that site, if such costs are approved in advance by the Ordering Officer in writing in the order for such services.

"2) The bidder must execute and return two (2) copies of this amendment by 2:00 P.M. Eastern Standard Time 19 October 1981.

"Acknowledgement of this amendment by execution and return of two copies is the only action which may be taken with regard to this Invitation For Bid.

"No revision in bids or additional bid will be acceptable. (Emphasis added.)"

ESW, whose plant is located in Somerville, Massachusetts, and is thus farther away from the performance site than NSY (which is located in the Newport area), objected to what it considered entirely new travel cost provisions. By letter of October 13, 1982, ESW returned the amendment unsigned, arguing that the Navy was treating travel expenses as an indirect cost and that this was contrary to the Defense Acquisition Regulation (DAR) and established Government cost accounting principles. ESW requested that the Navy issue a new amendment which did not violate DAR or accepted cost principles. Carlson Metalcraft, the third low bidder, never responded to the amendment.

The Navy apparently never responded directly to ESW's October 13 letter. Rather, it declared the ESW bid non-responsive for the firm's failure to acknowledge the amendment and on November 20, 1981, awarded the contract to NSY. The Navy assumes that ESW was notified of the award in accordance with its standard procedures. However, by letter of December 17, 1981, ESW indicated that it knew nothing of the award since this letter requested a status report on the procurement and extended the acceptance period for the ESW bid until January 31, 1982. By letter of January 5, 1982,

the Navy informed ESW that the award had been made to NSY in November. On January 19, 1982, ESW filed the present protest with our Office.

The threshold issue is whether ESW's protest is timely and should be considered on the merits. In the Navy's opinion, ESW's protest should be dismissed as untimely. The Navy argues that ESW's October 13 letter was a protest filed with the contracting agency and, under our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1982), any subsequent protest to our Office must be filed within 10 working days of actual or constructive knowledge of initial adverse agency action. According to the Navy, ESW was on notice of initial adverse agency action when October 19, 1981--the date by which the amendment had to be acknowledged--passed without the Navy issuing a new amendment as ESW requested in its October 13 letter. In light of this, the Navy contends that ESW's January 19, 1982, protest to our Office is untimely.

In the alternative, the Navy notes that, under its standard procedures, ESW should have been notified by postcard of the November 20 award to NSY. The Navy argues, therefore, that, even if notice of the award was considered the initial adverse agency action, ESW's January protest to our Office must still be ruled untimely.

ESW, however, maintains that it did not learn of the award to NSY until it received the Navy's January 5, 1982, letter. In addition, ESW claims that it made several attempts after its October 13 letter to learn the status of the procurement, but was never given an adequate response. We also note that nothing in record indicates that ESW or Carlson Metalcraft Co., Inc., were in fact notified of the award to NSY; the Navy only states that under standard procedures they should have been.

We have held that, when doubt exists as to when a protester knew or should have known the basis for its protest, we resolve that doubt in favor of the protester. Kentucky Building Maintenance, Inc., B-203206, October 9, 1981, 81-2 CPD 293. Here, because of the unusual fact situation, it is extremely difficult to discern exactly when ESW can be charged with knowledge of the basis for protest so that any of our normal filing deadlines come into play. At best, we are faced with conflicting statements regarding when ESW knew the basis for its protest. Under these circumstances, we resolve any doubt in ESW's favor and find the protest timely.

The key point in ESW's protest and the reason it refused to acknowledge the amendment is that, in ESW's opinion, the Navy is required to reimburse ESW for its employees' travel costs to and from the performance site. ESW interpreted the IFB's original travel provisions in this manner, and it was this possible interpretation which influenced the Navy to attempt to cancel the solicitation. According to ESW, the Navy should have allowed travel costs to be a direct cost to the contract but, if the Navy insisted on treating such costs as an indirect cost, then it should have given ESW an opportunity to offer a new bid price in response to the amendment.

We do not agree that ESW was entitled to be reimbursed for its employees' travel costs as direct costs to the contract. It is well recognized that the determination of the Government's minimum needs and the best methods for accommodating those needs is primarily the responsibility of the contracting agency. Maremont Corporation, 55 Comp. Gen. 1362 (1976), 76-2 CPD 181. Here, the Navy determined that it was in its best interests to use a form of fixed-price contract to meet its minimum needs. ESW would have the Navy use some type of cost reimbursement contract; however, there is no legal requirement that the Navy do so. Under the general rule, then, we have no basis to question the Navy's discretion in this matter.

It appears that ESW raised this argument because NSY has a competitive advantage due to its location close to the performance site. However, NSY's advantage is not the result of preferential or unfair treatment on the Navy's part. We have held that a contracting agency is not required to equalize the competitive positions of all potential bidders. The purpose of a competitive procurement is not to insure that all bidders face the same odds in competing for Government contracts, but rather to insure that the Government obtains its minimum requirements at the most favorable price. See Tenavision, Inc., B-199485, July 28, 1980, 80-2 CPD 76. Thus, contrary to ESW's apparent belief, the Navy was under no obligation to equalize ESW's competitive position in relation to that of NSY through the direct reimbursement of travel costs.

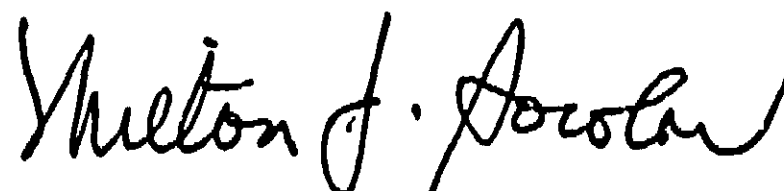
However, we agree with ESW that the Navy's decision to award a contract under the original solicitation was improper.

As a general rule, a contracting agency should cancel an IFB if it contains ambiguous specifications since the bidders are not able to compete on an equal basis. See, for

example, Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91. The Navy admits that paragraphs C30 and C32 as originally drafted did not make it clear that the contractor would not be reimbursed for travel costs between its plant and the place of performance. Consequently, the Navy would have been justified in canceling the IFB and resoliciting the requirement with revised travel cost provisions. Instead, the Navy chose to amend the IFB after bid opening. While such action is not common, it may be allowed under certain circumstances. In our decision in the matter of B.E. Baccroft Company, Inc., B-181621, December 12, 1974, 74-2 CPD 327, we denied a protest against a Navy decision to amend an IFB after bid opening. There, the Navy had decided that "the portion of the IFB setting forth the deductive bid items was ambiguous and determined that rebidding after clarification on the deductive items was necessary." We found that the Navy's action was necessary to insure that bids were prepared and evaluated on a common basis. Here, however, the Navy did not allow the bidders the opportunity to rebid, but required unqualified acceptance of its amendment--an amendment which, in our opinion, set out materially altered travel cost provisions.

Although the better course for the Navy to have taken here would have been to cancel the solicitation, we do not find that it acted unreasonably when it made the award to NSY without allowing a rebidding under either the original solicitation or an amended one. We reach this conclusion because throughout its correspondence with the Navy, as well as in its initial protest letter to our Office, ESW consistently argued that it was entitled to the award under the solicitation terms as originally specified and opposed both the cancellation of the IFB and revised travel cost provisions. Not until it filed its comments on the agency's protest report in May 1982 did ESW indicate any interest in participating in a resolicitation on the basis of the amended terms representing the Navy's actual needs. In these circumstances, it was reasonable for the Navy to conclude that a rebidding under either the original solicitation or an amended one would have proved fruitless since only NSY appeared willing to participate.

Protest denied.

for 
Comptroller General
of the United States